intended to over-reach the opposite party or made for any other ulterior motive.

After careful consideration, not forgetting, that the case for novation was not advanced at the first opportunity, and at a late stage, only after the application to strike out the statement of claim was made, I think that probably the delay was due to lack of deligence, on the part of instructing solicitors in eliciting the necessary facts from their client, when they were first consulted, and before sending their letter before action.

I have thus arrived at the conclusion that the application to amend is made *bona fide*, and, in the exercise of my discretion in order that justice may be done in this case, I allow the application for leave to amend. The second to the seventh defendants will not, in any way, be injured or prejudiced by allowing the amendment which can be compensated by costs. It follows, that the costs of the amendement must be paid by the plaintiff to the second to the seventh defendants, in any event.

I therefore reverse the order I had made in chambers that the statement of claim be struck out as also my order refusing leave to amend the statement of claim. Accordingly, the application to strike out the statement of claim is dismissed with no order as to costs while the application to amend the statement of claim is allowed. The defendants are thus at liberty to make such amendments to their respective defences as may be necessary to meet the plaintiff's case as disclosed by the amended statement of claim. The plaintiff's application for leave to cross examine the second to the seventh defendants on their affidavit filed in connection with the proceedings to strike out the statement of claim, will serve no useful purpose and is dismissed with no order as to costs.

WADKIN ROBINSON (MALAYSIA) SDN. BHD.

v.

RIMBER INDUSTRIES SDN. BHD.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 22-441-1992]
24 MARCH 1994

PRACTICE & PROCEDURE: Summary judgment - Claim for payment for goods sold and delivered - Goods do not conform to order specifications - Whether there was acceptance of the goods delivered.

This was an application for summary judgment whereupon the defendant applied for further arguments before the learned Judge.

The plaintiff's claim was for RM108,015.10 for payment of goods sold and delivered to the defendant. The defendant denied the debt contending that the delivery of a machine called the planner moulder had not conformed to their order specification and that as a result of the wrong delivery the defendant had suffered loss in excess of the sum claimed by the plaintiff. The defendant counterclaimed for RM336,672.01.

It was alleged by the plaintiff that there had been acceptance of the delivery as there was acknowledgment by the defendant of the delivery order without condition and with no express reservation. However, the defendant had thereafter sent several letters on the subject rejecting the moulder delivered. The Court addressed the issue of whether there had been acceptance of the goods delivered.

Held:

[1] The mere signing of the delivery order by the defendant cannot be regarded as acceptance of the goods in view of s. 41(1) Sale of Goods Act 1957. The signing merely went to show an acknowledgment by the defendant that the machinery stated in the delivery order had been delivered to the defendant. The plaintiff had misleadingly printed the exact moulder the defendant had ordered on the delivery order when actually it was of a different type.

[2] Although the defendant retained the moulder for a length of time, nonetheless it is

clear from the defendants' meetings and letters to the plaintiff that the defendant had intimated to the plaintiff the delivery of the wrong moulder. Therefore, there is merit in the defence that there was no acceptance of the wrongly delivered machinery.

[Order made in chambers set aside. Plaintiff's application for summary judgment dismissed with costs].

Cases referred to:
Ganda Edible Oils Sdn . Bhd. v. Tranagrain B.V. [1988] 1 MLJ 428
Milner v. Tucker [1823] 1 C & P 15
Re a Debtor [1939] Ch. 225

Legislation referred to:
Rules of the High Court 1980, O. 14
Sale of Goods Act 1957, ss. 41(1), 42
Sale of Goods Act 1893, s. 35 (UK)

For the plaintiff - Chin Chee Leong; M/s. Radhakrishnan & Co.
For the defendant - A Onn; M/s. Y.P. Cheong & Co.

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
This is an application by the plaintiff, Wadkin Robinson (Malaysia) Sdn. Bhd., for summary judgment against the defendant, Rimber Industries Sdn. Bhd., pursuant to O. 14 of the Rules of the High Court.

At the hearing in chambers on 13 October 1993, I allowed the application for summary judgment. The defendant applied for further argument which was heard on 4 December 1993. Having heard further arguments, I am of the view that the defendant has succeeded in satisfying the Court that there is merit in the defence.

The plaintiff's claim is for payment for goods sold and delivered to the defendant. The amount alleged by the plaintiff as still outstanding was RM108,015.10. The goods delivered to the defendant were machineries/tools used in the timber industries and they were delivered at various dates from 30 August 1991 to 11 November 1991. The total amount due to the plaintiff was RM271,148.87. The defendant, through its leasing company, Sogelease, had made payments up to the amount of RM163,133.77, thus leaving an outstanding balance of RM108,015.10.

The defendants denied owing the plaintiff the above amount (RM108,015.10) on the grounds that -

(a) Firstly, one of the machineries delivered (on 30 August 1991) was not the one ordered by the defendant. The defendant had ordered a planner moulder FD 5" x 4", whereas the plaintiff had instead delivered a planner moulder FD 4" X 4". In short the plaintiff had delivered the wrong machinery which the defendant had not accepted.
(b) Secondly, as a result of the wrong delivery, the defendant suffered loss in excess of the amount claimed by the plaintiff. The defendant counterclaimed against the plaintiff the amount of RM336,672.01.

Judging from the plaintiff's affidavit and the argument of learned Counsel for the plaintiff, it appears to me that the plaintiff is not disputing that they had delivered the wrong machinery. However, it is argued on behalf of the plaintiff that there had, nevertheless, been acceptance by the defendant of the machinery despite being wrongly delivered The plaintiff contends that the acceptance was signified by the acknowledgment of the delivery order without condition and with no express reservation by the defendant. *Ganda Edible Oils Sdn. Bhd. v. Tranagrain B V.* [1988] 1 MLJ 428 was relied upon, particularly that part of the judgment of Syed Agil Barakbah SCJ which states (at page 431):

> The right to reject may, however, be lost by waiver or by acceptance. In the case of waiver, a buyer who knows that the documents are defective takes them up without express reservation of his rights, loses the right to reject the documents. He cannot also reject the goods subsequently on the grounds that the documents were defective.

It is further contended by the plaintiff that the letter dated 12 December 1991 which the defendant wrote to the plaintiff was not a letter of rejection. Even if it was a letter of rejection, there was an unreasonable delay of about two months on the part of the defendant.

The question before me is whether or not there had been acceptance of the moulder planner FD 4" x 4" by the defendant. The *onus* is on the plaintiff to satisfy the Court that there had been acceptance by the defendant. The meaning of acceptance is enacted in s. 42 of the Sale of

Goods Act 1957 (Revised 1989) (hereinafter referred to as "SOGA") which provides:

> The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them.

From the above, it is clear that there are three methods of acceptance, namely:

(a) When the buyer intimates to the seller the acceptance;
(b) When the goods have been delivered to the buyer, and he does any act which is inconsistent with the ownership of the seller; or
(c) When, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller his rejection.

In my view, the present case does not fall under (a). To my mind the mere signing of the delivery order (Nos. 1396 - see encl. 5, exh. KS-1, page 4) by the defendant cannot be regarded as acceptance of it in view of s. 41(1) of the Sale of Goods Act which provides:

> 41 (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had reasonable opportunity of examining them for the purposes of ascertaining whether they are in conformity with the contract.

There is nothing in the plaintiff's affidavit to show that, prior to the delivery, the planner moulder had been examined by the defendant. The signing of the delivery order by the defendant was only an acknowledgment by the defendant that the machinery stated in the delivery order had been delivered to it. *Ganda Edible Oils* does not apply to the facts of the present case. The facts in that case are distinguishable. There the contract was an f.o.b. contract and the document signed by the appellant was not a delivery order but a tender document which was peculiar to such transaction. Moreover, in that case, when the appellant received and signed the tender document the appellant was aware of the shortage of the palm oil shipped, whereas in the present case the plaintiff had wrote "Wadkin Planner Moulder FD 5" x 4"" on the delivery order 1396 (see page 4 of Exh. KS-1 of encl. 5), thereby misleading the defendant into believing that the machinery delivered was the very one that the defendant had ordered (i.e. FD 5" x 4") when in actual fact what was delivered was a different machine - FD 4" x 4".

Clearly, situation (b) does not arise in the present case.

Now, does the present case falls under (c)? In order to show that there had been acceptance by reason of situation (c), the plaintiff must show that -

(i) there has been a lapse of reasonable time; and
(ii) the defendant had retained the good without intimating to the plaintiff of its rejection.

What amounts to a lapse of a reasonable time depends on the facts of each case, but its determination is not free from difficulty. It is not just a matter of counting the number of days or months that the goods were retained by the defendant: the surrounding circumstances including custom- and usage as to rejection in the particular circumstances will also be relevant. In *Milner v. Tucker* [1823] 1 C & P 15, it was held that there was acceptance when a chandelier was retained for nearly six months whereas in *Re a Debtor* [1939] Ch. 225 although the period was only three weeks (delivery of kitchen fitments), it was sufficient to constitute acceptance under s. 35 of the Sale of Goods Act 1893 (UK) (which corresponds to s. 42 of our Act).

In the present case, Exhs. R1-5, R1-6 and R1-7 of encl. 8 shows that the defendant had written three letters to the plaintiff expressing its dissatisfaction with the goods delivered by plaintiff, in particular with respect to the planner moulder mentioned above. The letter Exh R1-5 was dated 12 December 1991, the letter Exh. R1-6 was dated 25 January 1992 and the letter Exh. R1-7 was dated 23 October 1992. In letter R1-5-it is pertinent to note that it is stated, among other things:

(a) that even. before 7 December 1991 there had been a series of meetings and discussions between the representatives of the plaintiff and the defendant concerning the defendant's dissatisfaction with the machineries/tools delivered and the poor services rendered by the plaintiff;

(b) that a further meeting was held between the representatives of the two parties on 7 December 1991;

(c) that as a result of the meeting on 7 December 1991 both parties agreed to certain terms including the following provision:

> 4 . Machineries FD 5 x 4 (6 Heads) and FDB 5 x.4 (6 Heads) which were wrongly supplied as FD 4 x 4 (6 Heads) and under your insurance claim, respectively, will be withheld for further discussion

(d) that the whole terms set out in the letter R1-5 was agreed to by the representative of the plaintiff without any reservation (the letter R1-5 was jointly signed by the representatives of both companies).

In the letter R1-6, the defendant complained regarding the failure of the plaintiff to supply the defendant with the planner moulder FD 5' x 4" and demanded the plaintiff to deliver the machinery within one week of the date of the letter. The defendant notified that in the event the plaintiff failed to deliver the machinery, the defendant would buy the same from another supplier and any extra cost incurred would be charged to the plaintiff. It was also pointed out in the letter that as a result of the wrong delivery of FD 5" x 4" (what was delivered was FD 4" x 4") the defendant suffered loss to the amount of RM11,241.46 and the defendant claimed this amount from the plaintiff. In the final letter R1-7, the defendant informed the plaintiff that due to the plaintiffs failure to deliver the planner moulder FD 5" x 4" it had proceeded to purchase the machine from a third party; and the defendant claimed from the plaintiff the extra cost incurred in purchasing the necessary machinery from the third party, that is, the amount of RM51, 584. The defendant also claimed loss of income from 31 January 1992 to 30 June 92 from contract sales to the amount RM165,500.

Now on the basis of the above consideration, it is my finding that although after a lapse of reasonable time the defendant still retained the planner moulder FD 4" x 4", nonetheless it is clear from the defendant's affidavit (see encl. 8) including the above letters, especially R1-5, the contents of which were never challenged by the plaintiff, that the defendant had, through a series of discussions and meetings, even before 7 December 1991, intimated to the plaintiff of the wrong delivery; and that such discussions and meetings finally culminated in the formal rejection on 12 December 1991 of the planner moulder FD 4" x 4"; and it is not disputed that such intimation was accepted by the plaintiff when its representative signed the agreed terms on R1-5. Therefore, in my judgment there is merit in the defence that there was no acceptance of the wrongly delivered machinery. From the affidavits it is also my view that the defendant, by putting up the counterclaim that it had suffered considerable loss exceeding the amount claimed by the plaintiff as a result of the wrongly delivered machinery, had raised a triable issue.

I therefore set aside the order that I made in chambers on 13 October 1993 and the plaintiff's application for summary judgment is dismissed with costs.